

In the Supreme Court of the
United States

OCTOBER TERM, 1983

SUE GOTTFRIED, et al.,

v.

UNITED STATES OF AMERICA, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF IN RESPONSE
TO OPPOSITION OF THE FEDERAL
RESPONDENTS AND RESPONDENT
COMMUNITY TELEVISION OF
SOUTHERN CALIFORNIA

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No. 83-1614

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This reply addresses both the Brief for the Federal Respondents in Opposition ("Fed. Opp.") and the Brief for Community Television of Southern California in Opposition ("KCET Opp.").

1. The Solicitor General asserts that the Department of Justice is not responsible for enforcing the Rehabilitation

Act and thus can hardly be required to issue interpretive regulations (Fed. Opp. 6). In *Gottfried I*, however, the Solicitor General acknowledged that the Department of Justice does have that responsibility, to insure that "unified Federal standards will emerge" (Reply Br. for FCC, 9 n. 6). The Solicitor General advised this Court that the Department of Justice,

the agency now responsible for coordinating implementation of section 504 is presently preparing regulation guidelines concerning what obligation section 504 imposes on broadcasters, and producers receiving Federal financial assistance. Those regulations, when promulgated, will help to insure uniform enforcement of section 504 by funding agencies with respect to all public television stations.

(Pet. 14).

The Department of Justice assumed responsibility for coordinating the implementation of section 504 from the Department of Health, Education and Welfare ("HEW"). *Consolidated Rail Corp. v. Darrone*, ____ U.S.____, 104 S.Ct. 1248, 1254 n. 14 (1984). HEW advised the District Court that as the coordinating agency for section 504 it had the responsibility for promulgating a regulation to make television understandable for hearing impaired people (Pet. App. 57). That responsibility passed to the Department of Justice when it became the coordinating agency.

2. Throughout the litigation the Executive Department repeatedly represented to the District Court that a regulation was necessary, and that policy in this new area could not be adequately established in isolated administrative adjudications (Pet. 12-15; Pet. App. 53-61). In *Gottfried I*, this Court accepted the Solicitor General's argument

that policy in this area could only be set by rule making and could not be made in isolated license renewal proceedings. The Court stated that rule making is "generally a 'better, fairer, and more effective' method of implementing a new industry-wide policy than is the uneven application of conditions in isolated license renewal proceedings." 103 S.Ct. at 893.

The Department of Education's ("ED") adjudication on February 12, 1982 of petitioners' complaint filed in 1978 does not relieve the Executive Department of its obligation to issue a regulation.¹ The Secretary of HEW explained why a regulation was necessary and why policy in this area could not be set by individual adjudications (Pet. App. 57-59). ED's adjudication of the stale complaint did not purport to serve as a national guideline defining what obligations section 504 imposes on broadcasters and producers receiving Federal financial assistance. Indeed the decision did not even conclude, as the federal respondents erroneously state it did (Fed. Opp. 9), that KCET had complied with section 504. ED did not purport to determine what obligation KCET has under section 504, flowing from its receipt of more than two million dollars from the Corporation for Public Broadcasting (Pet. 23), nor did it concern itself with how KCET handled the Federal financial assistance it received from numerous other Federal agencies. Instead ED merely required, as the Court of Appeals noted (Pet. App. 11), that where ED produced a program with captions and made that program available to KCET, the station was required to broadcast the program with captions.

¹ Respondent KCET gives the false impression that the adjudication was in August 1981 (KCET Opp. 4, n. 7). The decision is appended to KCET's Brief in *Gottfried I* and clearly reveals that it is dated February 12, 1982, some three months after the District Court entered judgment herein.

The Court of Appeals appears to acknowledge that adjudication, rather than regulation, is inappropriate for setting policy with regard to captioning programs for hearing impaired people (Pet. App. 9). The Court held however that petitioners could not raise this issue because they "are not regulated parties." This startling proposition finds no support in the law. The regulations implementing section 504 are primarily for the benefit of disabled people, not for the benefit of recipients of Federal financial assistance. In enacting section 504, Congress conferred rights on disabled individuals, and mandated that the responsible federal agencies issue appropriate regulations to assure that these rights are honored and enforced. *Cherry v. Matthews*, 419 F.Supp. 922 (D.D.C. 1976); *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1280-82 (7th Cir. 1977). See, *Adam v. Richardson*, 480 F.2d 1159 (D.C.C. 1973). Petitioners have a private cause of action to enforce their rights under section 504. *Darrone, supra.*

The Federal respondents assert that the Executive Department acted "in good faith" when it explicitly acknowledged the necessity for a regulation, explicitly acknowledged responsibility for issuing it promptly, and repeatedly assured the District Court that the regulation would be forthcoming expeditiously (Fed. Opp. 8). They have not however explained why they changed positions. See, *Motor Vehicle Manufacturers Association v. State Farm Mutual*, ____ U.S. ____, 103 S.Ct. 2856 (1983).

3. The federal defendants do not deny that the FCC has a duty under the Communications Act to assure itself that its television licensees take positive steps to make their programs understandable and available to their hearing impaired viewers. As this Court stated in *Gottfried I*, no licensee "whether commercial or public, may simply

ignore the needs of the hearing impaired in discharging its responsibilities to the community which it serves." 103 S.Ct. at 892. The federal respondents assert that the Commission has met its obligation by relying on "voluntary" action by television broadcasters (Fed. Opp. 10). In *Gottfried I* counsel for the FCC advised the Court that the Commission "requires the transmission of emergency announcements in visual form." For the rest, "[i]t has decided that . . . mandatory requirements should not be imposed" (Tr. of Argument October 12, 1982, 23). The District Court correctly concluded that the absence of mandatory requirements has resulted in discrimination against hearing impaired people (Pet. App. 33).

Finally, the Commission must issue a section 504 regulation because it grants Federal financial assistance within the meaning of *Grove City College v. Bell*, ____ U.S. ____, 104 S.Ct. 1211 (1984) (Pet. 15-19), and because it is an "executive agency" required by the 1978 amendment to section 504, to issue a regulation (Pet. 19).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 1, 1984, I served the within *Petitioners' Reply Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on June 1, 1984, at Los Angeles, California.

Robin J. McColgan
(Original signed)